



# OLR RESEARCH REPORT

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## CONVERSION OF NONPROFIT HOSPITAL

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You asked for a description of the law regarding the process for a nonprofit hospital to become a for-profit hospital.

### SUMMARY

State law requires the public health (DPH) commissioner or her designee and the attorney general to review and approve a nonprofit hospital's agreement to sell or otherwise transfer a material amount of its assets or operations or to change the control of its operations to a for-profit entity (CGS §§ [19a-486](#) to [486h](#)). Any agreement without such approval is void.

Prior to entering such a transaction, the hospital and purchaser must concurrently submit a certificate of need (CON) determination letter to DPH and the attorney general. The attorney general must determine if the agreement involves a material amount of the nonprofit's assets or operations or a change in control of a hospital's operations. If he determines that it does, the commissioner and attorney general then give the hospital and purchaser a more detailed application to complete.

The attorney general must review the proposed agreement and approve it, approve it with modifications, or disapprove it. The law sets out the criteria and time periods for review. The attorney general may subpoena individuals, issue written interrogatories, and contract with experts or consultants in his review.

The public health commissioner must also approve any proposed agreement. The law sets out the standards for the commissioner's review, and also allows her to subpoena individuals, issue interrogatories, and contract with experts when reviewing the application. In addition, DPH must determine whether to approve the request for CON authorization that is part of the application.

The attorney general and commissioner must hold at least one joint public hearing in the primary service area of the nonprofit entity before approving or disapproving a proposed agreement.

DPH must refuse to license a nonprofit hospital, or if already licensed, suspend or revoke its license, if it transfers a material amount of its assets or operations to a for-profit entity without the commissioner's or the attorney general's approval or if it is not complying with an agreement approved by them.

The nonprofit conversion statute was enacted in 1997 (PA 97-188) and has been amended several times since then. The first application of the law was the 2001 approval of Essent Healthcare's purchase of Sharon Hospital. For more information about that decision, see OLR Report [2001-R-0811](#), as well as the attorney general's decision approving the transaction, available at [http://www.ct.gov/ag/lib/ag/press\\_releases/2001/health/shfinal.pdf](http://www.ct.gov/ag/lib/ag/press_releases/2001/health/shfinal.pdf).

## **NONPROFIT HOSPITAL CONVERSION LAW**

### ***Notice and Approval Requirement***

The law prohibits a nonprofit hospital from entering into an agreement to transfer a material amount of its assets or operations or to a change in control of operations to a person organized or operated as a for-profit entity without first notifying the attorney general and DPH commissioner and receiving their approval. These provisions apply as well to any entity affiliated with a nonprofit hospital through governance or membership, including holding companies or subsidiaries.

For this purpose, "transfer" means selling, transferring, leasing, exchanging, optioning, conveying, giving, or otherwise disposing of or transferring control. It includes transfer by merger or joint venture not in the ordinary course of business. "Control" means possession of the power to direct the management and policies of a person unless the power is the result of an official position or office (CGS §§ [19a-486](#), [486a\(a\)](#)).

The nonprofit conversion law specifies that all references to the DPH commissioner include the commissioner's designee.

***Certificate of Need Determination Letter and Conversion Application***

Prior to such a transaction, the hospital and purchaser must concurrently submit a CON determination letter to the commissioner and attorney general by serving it on them by certified mail, return receipt requested, or hand delivery to each office. The letter must contain (1) the hospital's and purchaser's names and addresses; (2) a brief description of the proposed agreement terms; and (3) the estimated capital expenditure, cost, or value associated with the proposed agreement. The letter is subject to disclosure under the Freedom of Information Act (FOIA) (CGS § [19a-486a\(b\)](#)).

The commissioner and attorney general must review the CON determination letter, with the attorney general determining whether the proposed agreement requires approval under the nonprofit conversion law. If it does, they must give the hospital and the purchaser an application, unless the commissioner refuses to accept the letter.

The application form must require:

1. the hospital's and purchaser's names and addresses;
2. a description of proposed agreement terms;
3. copies of all contracts, agreements, and memoranda of understanding relating to the proposed agreement;
4. a fairness evaluation by an independent person expert in these agreements that applies the criteria established by law for the attorney general's approval of the agreement (see below);
5. documentation that the hospital exercised due diligence in deciding to transfer, selecting the purchaser, obtaining the fairness evaluation, and negotiating the terms and conditions of the transfer, including disclosing the terms of any other offers the hospital rejected and why; and

6. other information the attorney general and commissioner deem necessary to conduct their review under the nonprofit conversion law and the CON law.

The application is subject to disclosure under FOIA (CGS § [19a-486a\(c\)](#)).

The Office of Health Care Access (OHCA) division of DPH administers the CON program. Generally, a CON authorization is required when a health care facility proposes (1) establishment of new facilities or services, (2) a change in ownership, (3) the purchase or acquisition of certain equipment, or (4) termination of certain services.

### ***Filing of Application***

The purchaser and hospital must concurrently file the application with the commissioner and the attorney general within 60 days after the application form is mailed to them. The commissioner and the attorney general must review the application and determine whether it is complete. They must, within 20 days of receiving it, give written notice to the purchaser and the hospital of any deficiencies. The application is not deemed complete until these deficiencies are fixed (CGS § [19a-486a\(d\)](#)).

Within 25 days after getting the complete application, the commissioner and the attorney general must jointly publish a summary of the agreement in a general circulation newspaper in the hospital's area (CGS § [19a-486a\(e\)](#)). Any person can seek to intervene at the public hearing on the application according to the contested case provisions of the Uniform Administrative Procedure Act (UAPA) (CGS § [19a-486a\(f\)](#)).

### ***Timeframe for Application Review***

Within 120 days of receiving the completed application, the attorney general and the commissioner must either approve it (with or without modification) or deny it. The commissioner must also determine whether to approve, with or without modification, or deny an application for CON authorization that is part of the application, according to the law regarding CON determinations. The commissioner must make the CON decision within the same time period as the completed application.

The 120-day deadline can be extended if the attorney general, the commissioner, the hospital, and the purchaser all agree. The deadline is tolled (delayed) for legal action taken by the attorney general to enforce a subpoena for the attorney general's or commissioner's review, as

described below. The tolling includes any appeal or time for the filing of an appeal. The application is deemed approved if the commissioner and the attorney general do not act within the 120-day period, unless extended (CGS § [19a-486b](#)).

### ***Attorney General's Review***

***Standards for Approval.*** The attorney general must disapprove an application as not in the public interest if he determines that:

1. the transaction is prohibited by state statutory or common law on nonprofits, trusts, or charities;
2. the hospital did not exercise due diligence in deciding to transfer, selecting the purchaser, obtaining an independent expert's fairness evaluation, or negotiating the transfer's terms or conditions;
3. the hospital did not disclose conflicts of interest, including those related to board members, officers, key employees, and experts of the hospital, purchaser, or other party to the transaction;
4. the hospital will not receive fair market value for its assets (the most likely price the assets would bring in a competitive and open market sale under all conditions needed for a fair sale, with the buyer and seller acting prudently, knowledgeably, and in their own best interest, with a reasonable exposure time in the open market);
5. the assets' fair market value was manipulated, causing their value to decrease;
6. the hospital's financing of the transaction will put the assets at unreasonable risk;
7. any management contract being considered is not for reasonable fair value;
8. a sum equal to the fair market value of the hospital's assets (a) is not being transferred to one or more people selected by the Superior Court who are not affiliated through corporate structure, governance, or membership with the hospital or purchaser, unless the hospital continues to operate on a nonprofit basis after the transaction and the sum is transferred to the nonprofit to provide health care services and (b) is not being used for any of the following: appropriate charitable health care purposes consistent

with the hospital's original purpose, support and promotion of health care generally in the affected community, or in the case of any assets subject to a use restriction imposed by a donor, for a purpose consistent with the donor's intent; or

9. the hospital or purchaser has not provided the attorney general with sufficient information to adequately evaluate the agreement, provided the attorney general has notified the hospital or purchaser of the inadequacy of the information and provided a reasonable opportunity to remedy it (CGS § [19a-486c\(a\)](#)).

**Subpoena Power.** While reviewing the agreement, the attorney general can issue and serve written subpoenas on individuals to appear before him and testify or provide documents on any matters relevant to his review. He can also issue written interrogatories for answers under oath on any matters relevant to his review with a return date allowing for a reasonable response time.

The attorney general can apply to Superior Court for the Hartford Judicial District to enforce the subpoena when a person fails to comply. The court, after notice, can serve the person with an order to comply.

Service of subpoenas, notices of depositions, and written interrogatories can be made by (1) personal service at the person's usual place of abode or (2) certified mail, return receipt requested, addressed to the person's principal place of business or residence (CGS § [19a-486c\(b\)](#)).

**Expert Consultants.** The law allows the attorney general to contract with experts or consultants for assistance in reviewing the agreement. This includes assistance in independently determining the fair market value of the hospital's assets. The attorney general can appoint or contract with another person to review the application and make recommendations to him. The attorney general must submit any bills for such contracts to the purchaser, who is responsible for paying these costs within 30 days of receipt. Bills for these services cannot exceed \$300,000 (CGS § [19a-486c\(c\)](#)).

### **DPH's Review**

**Standards for Approval.** The commissioner must deny an application unless she finds that:

1. the affected community is assured of continued access to affordable health care;

2. if the asset or operation being transferred provides or has provided health care to uninsured or underinsured people, the purchaser has committed to providing health care to such people;
3. safeguards are in place to avoid a conflict of interest in patient referral if health care providers or insurers are offered investment or ownership opportunities in the purchaser or a related entity; and
4. CON authorization is justified according to law (CGS § [19a-486d\(a\)](#)).

**Subpoena Power.** The commissioner, in reviewing the agreement, can issue written subpoenas and interrogatories under the same procedures and conditions as for the attorney general's review. The commissioner, through the attorney general, can apply to Superior Court to enforce compliance (CGS § [19a-486d\(b\)](#)).

**Expert Consultants.** The law allows the commissioner to contract with any person, including financial or actuarial experts or consultants, or legal experts with the attorney general's approval, to assist with the application review. The commissioner must bill the purchaser for such contracts; the bills cannot exceed \$150,000. The purchaser must pay the bills within 30 days of receiving them (CGS § [19a-486d\(a\)](#)).

### **Public Hearing**

By law, the attorney general and the commissioner must jointly hold at least one public hearing before making any decision on the proposed agreement. One hearing must be in the primary service area of the nonprofit hospital. Notice of the hearing's time and place must be given at least 14 days before by publication in one or more general circulation newspapers in the affected community (CGS § [19a-486e](#)).

### **Appeal Right**

After exhausting administrative remedies, the hospital or purchaser can appeal to the Superior Court the attorney general's or commissioner's decision to disapprove the proposed agreement or approve it with modifications. The law specifies that it must not be construed as applying the UAPA to the attorney general's proceedings (CGS § [19a-486f](#)).

### ***DPH License Authority***

The commissioner must refuse to license a nonprofit hospital or, if already licensed, suspend or revoke the license, if the commissioner finds after a hearing and an opportunity to be heard that:

1. a transaction occurred involving transfer of a material amount of the hospital's assets or operations or a change in control of operations to a for-profit entity without the commissioner's approval (if necessary);
2. such a transaction occurred without the attorney general's approval (if necessary) and he certifies to the DPH commissioner that the transaction involved a material amount of the hospital's assets or operations or a change in control of operations; or
3. the hospital is not complying with the terms of the agreement approved by the attorney general and the commissioner under the nonprofit conversion law (CGS § [19a-486g](#)).

### ***Construction of Governing Law***

The conversion law specifies that it does not limit (1) the common law or statutory authority of the attorney general, (2) the statutory authority of the DPH commissioner, or (3) the application of the doctrines of "cy pres" or "approximation" (CGS § [19a-486h](#)).

The charitable trust doctrine provides that assets of a public benefit corporation are irrevocably dedicated to charitable purposes and continue to carry charitable obligations, even when the corporation is reorganized or dissolved. The exception is the "cy pres" doctrine, which holds that when the original charitable purpose becomes impossible or impractical to fulfill, charitable purposes that are as close as possible to the original charitable purposes must be substituted.

Under the "approximation" doctrine, the precise terms of a charitable trust can be varied under certain circumstances. It is used only where, on failure of the charitable trust, the court finds a general charitable intent. Under this doctrine, the general intent of the donor is carried out as nearly as can be even if the particular method contemplated by the donor cannot be followed.

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